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proportionate annual value of her son's portion of the estate, viz., Rs. 23,333 or thereabouts, that Rs. 150 a month is a suitable allowance for her, and this she will be entitled to receive from the time when she may separate from her son.

We therefore direct that the decree of the lower Court be set aside; the suit, so far as the defendant No. 1 and the representatives of Annoda Pershad are concerned, be dismissed; the plaintiff's claim for back maintenance be also dismissed, but that a declaratory relief be granted to her as expressed above, as against the share of the estate left by Tara Churn Coondoo now in the hands of her son, the defendant No. 2.

As regards the costs, we think that the defendant No 1 is entitled to his costs both in this and the lower Court and as against him the suit is dismissed with costs.

J. V. W.

*Decree varied.*

*Before Mr. Justice Prinsep and Mr. Justice Beverley.*

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RAKHAL CHUNDER BOSE AND OTHERS (PETITIONERS) v. DWARKA  
 NATH MISSER (DECREE-HOLDER) AND KALLY DASS MISSER  
 (AUCTION-PURCHASER) AND OTHERS (JUDGMENT-DEBTORS)\*

*Civil Procedure Code, s. 311—Application to set aside sale—“Person whose property has been sold”—Mortgagee—Transfer of Property Act (IV of 1882), ss. 86, 87.*

The mortgagees of a certain tenure obtained, on 11th September 1884 under s. 86 of the Transfer of Property Act, a decree for foreclosure, which declared that, on failure to pay the amount found due, the mortgagor's right of redemption should be barred on 11th March 1885; this time was subsequently extended on the application of the mortgagor to 30th April 1885. On the 6th April 1885, in execution of a decree for arrears of rent obtained by the superior holder of the tenure against the mortgagor, the tenure was sold free from incumbrances. The mortgagees applied under s. 311 of the Civil Procedure Code to have the sale set aside for material irregularity. *Held*, that, under s. 86 of the Transfer of Property Act, the mortgagees had such an interest in the property as brought them within the words of s. 311, “person whose property has been sold,” and entitled them to make the application.

IN this case the judgment appealed from was as follows:—

\* Appeal from Order No. 298 of 1885, against the order of Baboo Kanti Chunder Bhaduri, Munsiff of Satkhira in Khoolnah, dated the 5th of September 1885.

" This was an application to set aside a sale on the ground of material irregularity in publishing or conducting that sale. The application was made under s. 311 of the Code of Civil Procedure. The applicants are the mortgagees, and the question is whether the words 'any person whose immoveable property has been sold' in s. 311 of the Code of Civil Procedure do or do not include a mortgagee. The case of *In the matter of the petition of Bhagabati Churn Bhattacharjee Chowdhry* (1) is in point. It has been there decided that the word 'property' in those words means property *de facto* and not property *de jure*. The mortgagee, in my opinion, is not the owner of the property *de facto*; but he is master of it *de jure*. He no doubt has a charge on the property, and even on the surplus of the proceeds of sale after payment of the rent, &c., for the arrears of which it was sold. This being so the petitioners cannot apply to the Court under s. 311 of the Code of Civil Procedure, and the application is therefore rejected, and the sale is confirmed."

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From this decision the mortgagees appealed to the High Court.

Baboo Troilokya Nath Mitter for the appellants.

Baboo Rash Behari Ghose and Baboo Sharoda Pershad Roy for the respondents.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

The appellants, who are the mortgagees of a certain tenure obtained a decree for foreclosure under s. 86 of the Transfer of Property Act. That decree was made on the 11th September 1884, and declared that, on failure to pay the amount due, the mortgagor's right of redemption should be barred on the 11th March 1885. In that month the mortgagor applied to the Court under s. 87 to enlarge the time, and on the 6th April the Court made an order fixing the 30th idem as the date on which the foreclosure would become absolute in the event of non-payment.

Meantime, the superior holder of the tenure obtained a decree against the mortgagor for rent, and in execution of that decree the tenure itself was sold on the 6th April 1885, (apparently)

(1) I. L. R., 8 Calc., 367; 10 C. L. R., 441.

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free of incumbrances. On the 10th April, the mortgagees applied under s. 311 of the Civil Procedure Code to have the sale set aside, and on the 5th September following the Court disposed of that application, holding on the authority of the case of *In the matter of the petition of Bhagabati Churn Bhattacharjee Chowdhry* (1), that a mortgagee was not a person whose property had been sold within the meaning of that section. Against that order the mortgagees now appeal.

It is pressed upon us on their behalf that a decree for foreclosure having been made on the 11th September 1884, the proprietary right in the tenure passed to the mortgagees on that date, or if not then, at any rate on the 11th March 1885, the date on which the foreclosure was to become absolute—it being contended that the order of the 6th April enlarging the time could not have retrospective effect. On the other hand, it is urged that the proprietary right does not pass to the mortgagee until the foreclosure decree is made absolute, and that no such absolute decree has yet been made in this case.

We think that, looking to the terms of s. 86 of the Transfer of Property Act, it may fairly be said that the mortgagees had such an interest in the property as entitled them to make an application under s. 311 of the Code. A decree under s. 86 virtually has the effect of declaring the mortgagees' right to the property subject to the liability to "transfer" it to the mortgagor on payment of the sum found due within a certain date. If payment is not made on or before the date fixed, the mortgagor is "absolutely debarred of all right"—not to the property, but—"to redeem the property."

In such a state of things it would be as difficult to hold that, after a foreclosure decree, the property still belongs solely to the mortgagor, as it would be to hold that it is the property of the mortgagee. We think that either the mortgagor or the mortgagee, under such circumstances, would be entitled to apply to the Court under s. 311 of the Code, if he had reason to believe that the property had been irregularly or collusively sold. Were we to hold otherwise and to say that the mortgagee had no right to intervene under that section, the result would be that a mortgaged

(1) I. L. R., 8 Calc., 367; 10 C. L. R., 441.

property might be sold behind the back of the mortgagee for a very inadequate sum, and he might thus be deprived of the security for which he had already obtained a conditional decree, or driven to institute fresh legal proceedings to set aside the fraud that had been practised upon him.

We accordingly set aside the order of the Munsiff of the 5th September last, and direct that the appellant's application be heard. Appellants will have their costs in this appeal.

J. V. W. —

*Appeal allowed.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Mitter and Mr. Justice Grant.*

ABDUL HAMID *v.* THE EMPRESS.\*

*Forgery—Penal Code, s. 464—Intention in fabricating documents—Fraudulent and dishonest fabrication.* 1886 September 7.

The accused, who was a copyist in the Sub-divisional Office at B, applied for a clerkship then vacant in that office. An endorsement on his application, recommending him for the post and purporting to have been made by the Sub-divisional Officer of B, was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Sub-divisional Officer at B, informing the latter officer that he, the Collector, had selected the accused for the vacant post. The Sub-divisional Officer, having some suspicion as to the genuineness of this letter, wrote a demi-official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post office the accused fabricated a third document, purporting to be a letter from the Sub-divisional Officer to the post master asking him to stop the despatch of the demi-official letter. The accused was charged with, and convicted in the Sessions Court of the offence of forgery, under s. 464 of the Penal Code, in respect of the three documents. *Held*, the conviction was right with regard to the two first documents, but with regard to the third document it could not be said that he falsely made it either dishonestly or fraudulently within the meaning of that section.

THE facts of this case are sufficiently stated in the judgment of the Court (MITTER and GRANT, JJ.)

Baboo Umbica Churn Bose, for the appellant.

*The Deputy Legal Remembrancer* (Mr. Kilby), for the Crown.

\* Criminal Appeal No. 491 of 1886, against the sentence passed by J. B. Worgan, Esq., Sessions Judge of Cuttack, dated the 28th of June 1886.

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